

UNITED STATES OF AMERICA,
 PETITIONER,

 V.

JOSEPH AARON EDWARDS,
 RESPONDENT.

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FRIDAY, FEBRUARY 11, 2011

THE COURT: GOOD AFTERNOON. MR. ACKER, TELL ME WHERE YOU ARE IN THE DISCOVERY PRODUCTION.

MR. ACKER: BE GLAD TO, YOUR HONOR. THERE ARE TWO BASIC KINDS OF INITIAL DISCLOSURES THAT WE'RE MAKING; ONE IS THE DOCUMENTS, BASICALLY ALL OF THEIR MEDICAL RECORDS, THEIR PSYCHOLOGICAL RECORDS, THEIR PRISON DISCIPLINARY RECORDS, ET CETERA. AND THEN THE OTHER KIND OF INITIAL DISCLOSURE IS EXPERT REPORTS.

SO I'LL DEAL WITH THOSE TWO KINDS DIFFERENTLY FOR EACH OF THE FIVE PEOPLE. WOULD YOU LIKE ME TO GIVE YOU --

THE COURT: WE WILL START WITH MR. EDWARDS AND THEN MR. TIMMS AND MR. JOHNSON AND MR. HALL.

MR. ACKER: YES. SO FOR MR. EDWARDS, WE COMPLETED ALL OF OUR INITIAL DISCLOSURES, BOTH THE DOCUMENTS AND THE EXPERT REPORTS ON OCTOBER 4, OF 2010.

THE COURT: OKAY. SO DISCOVERY IS COMPLETE?

MR. ACKER: FROM THE GOVERNMENT. NOW, PURSUANT TO THE STANDING ORDER, WHICH YOUR HONOR CERTAINLY CAN MODIFY, BUT PURSUANT TO THE STANDING ORDER, THAT WOULD HAVE GIVEN THE RESPONDENT UNTIL, I BELIEVE IT WAS DECEMBER 6, TO PRODUCE. THE RESPONDENT FILED A MOTION FOR EXTENSION OF TIME FOR 90 DAYS, WHICH THE GOVERNMENT DID NOT OPPOSE, BUT THE COURT HAS NOT RULED ON THAT. THAT WOULD BE A DEADLINE UNTIL MARCH 7, FOR THE RESPONDENTS TO

1 GET THEIR DISCOVERY TO US.

2 **THE COURT:** WHAT KIND OF DISCOVERY DO YOU EXPECT
3 TO GET FROM THEM?

4 **MR. ACKER:** WELL, THE MAIN THING IS IF THEY HAVE
5 AN EXPERT, WE NEED THE REPORT. THE STANDING ORDER
6 REQUIRES THEM TO GIVE US ANY OTHER MEDICAL RECORDS, ANY
7 OTHER PSYCHOLOGICAL RECORDS, ANYTHING THEY PLAN TO USE AT
8 TRIAL THEY MUST DISCLOSE TO US, ALONG WITH THEIR EXPERT.

9 SO THAT'S CURRENTLY -- THEY HAVE REQUESTED UNTIL
10 MARCH 7. I HAVE BEEN INFORMED THAT THEY WOULD LIKE TO
11 HAVE UNTIL MARCH 15, BUT YOU WOULD HAVE TO TAKE THAT UP
12 WITH THE PUBLIC DEFENDER.

13 **THE COURT:** I HAVEN'T REALLY GIVEN THIS ANY
14 THOUGHT BEFORE, BUT IT OCCURS TO ME IN THE WAY IN WHICH
15 THESE CASES BALANCE OUT, WHY DOES THE DEFENDANT -- I
16 UNDERSTAND YOU CAN SAY IT'S A CIVIL CASE AND THAT THERE'S
17 MUTUALITY AND THIS AND THAT, BUT WHY SHOULD THE DEFENDANT
18 HAVE TO TELL YOU ANYTHING? IT SEEMS TO ME THAT THE
19 DEFENDANT SHOULDN'T HAVE TO TELL YOU A WORD. IF IT WAS A
20 CRIMINAL CASE, THE DEFENDANT HAS NO OBLIGATION. YOU CAN'T
21 ASK THE DEFENDANT FOR DISCOVERY.

22 **MR. ACKER:** I BELIEVE EVEN IN CRIMINAL CASES,
23 YOUR HONOR, IF THEY HAVE AN EXPERT I BELIEVE THEY HAVE
24 CERTAIN DISCOVERY OBLIGATIONS UNDER RULE 14. I DON'T
25 PRIMARILY PRACTICE IN THE CRIMINAL AREA BUT THERE ARE SOME

1 DISCOVERY OBLIGATIONS EVEN IN CRIMINAL CASES.

2 **THE COURT:** IF THE DEFENDANT HAS AN EXPERT THAT
3 SAYS HE OR SHE IS INSANE, BUT I DON'T KNOW THAT THEY HAVE
4 AN OBLIGATION TO DISCLOSE EVIDENCE WHERE THEY DON'T HAVE A
5 BURDEN OF PROOF. I MEAN, THEY HAVE A BURDEN OF COMING
6 FORWARD WITH AN INSANITY DEFENSE, BUT --

7 **MR. ACKER:** I'D HAVE TO GO BACK TO THE RULES,
8 BUT I DO KNOW THAT THERE ARE SOME DISCOVERY OBLIGATIONS
9 EVEN IN CRIMINAL CASES.

10 BUT, YOUR HONOR, THIS IS A CIVIL CASE AND THEY ARE
11 REQUIRED TO DISCLOSE TO US CERTAIN THINGS, INCLUDING, AT A
12 MINIMUM, ANY EVIDENCE THAT THEY INTEND TO INTRODUCE AT
13 TRIAL.

14 **THE COURT:** THEY DON'T HAVE TO PROVE THAT THEY
15 ARE SANE; YOU HAVE TO PROVE THAT THEY ARE NOT SANE.

16 **MR. ACKER:** THAT'S CORRECT, YOUR HONOR. BUT THE
17 CIVIL RULES ARE SET UP SO BOTH PARTIES COME IN KNOWING, NO
18 SURPRISES, ESSENTIALLY FULL DISCLOSURE OF WHAT THEY INTEND
19 TO INTRODUCE AT TRIAL. IF THE RESPONDENT DECIDES THEY ARE
20 NOT GOING TO INTRODUCE ANY EVIDENCE, THEN CONCEIVABLY THEY
21 WOULDN'T HAVE TO PRODUCE ANYTHING TO US. NOW, THE
22 STANDING ORDER DOES AND CIVIL RULES PROVIDE A LITTLE MORE.

23 **THE COURT:** BUT I DON'T THINK THAT'S THOUGHT
24 THROUGH. I THINK THAT WAS JUST A KNEE-JERK STANDING ORDER
25 WHERE IT WAS GRAFTED ONTO THE PROCEEDINGS THAT IT'S A

1 CIVIL CASE AND THEREFORE IT'S JUST LIKE A CONTRACT SUIT OR
2 SOMETHING LIKE THAT. THAT'S NOT THE REALITY OF IT. THE
3 REALITY IS THEY SHOULDN'T HAVE TO PRODUCE ANYTHING.

4 **MR. ACKER:** WELL, YOUR HONOR, THE OTHER PLACE
5 THAT EXPERT REPORTS ARE REQUIRED TO BE PRODUCED IS THE
6 PROCEDURE UNDER 4248 INCORPORATES THE PROCEDURES UNDER
7 SECTION 4247, AND UNDER THAT THE EXPERT REPORT IS GIVEN TO
8 THE COURT, IS FILED WITH THE COURT, SO THAT BOTH SIDES
9 HAVE EACH OTHER'S EXPERTS BEFORE THE HEARING. THAT IS
10 ROUTINELY DONE IN THE 4246 CASES, WHICH ALSO USE THE
11 PROCEDURE UNDER 4247.

12 **THE COURT:** THE ISSUE IS WHETHER YOU CORRECTLY
13 CERTIFIED THE PERSON WHEN YOU MADE THE CERTIFICATION. IF
14 YOU DIDN'T, THEN THEY'RE TO BE RELEASED.

15 **MR. ACKER:** WELL, THE ISSUE I THINK IS A LITTLE
16 BIT MORE THAN THAT. I THINK THE BURDEN ON US IS A LITTLE
17 MORE THAN THAT, YOUR HONOR. IT'S WHETHER OR NOT WE CAN
18 PROVE THE ELEMENTS IN THE STATUTE. NOT JUST WHETHER THE
19 CERTIFICATION WAS CORRECT BUT WHETHER THE UNDERLYING FACTS
20 MEET THE BURDEN THAT WE HAVE BY A PREPONDERANCE OF THE
21 EVIDENCE.

22 BUT, YES, YOUR HONOR, THE BURDEN IS ON US, BUT IN A
23 CIVIL CASE AND SPECIFICALLY UNDER THE PROCEDURES SET OUT
24 IN SECTION 4247, THE EXPERT REPORTS ARE SUPPOSED TO BE
25 DISCLOSED IN ADVANCE.

1 IN ADDITION, YOUR HONOR, BECAUSE THIS IS A CIVIL CASE
2 THE STANDING ORDER, AND IT WAS NOT A KNEE-JERK STANDING
3 ORDER, IT'S SOMETHING THE FEDERAL PUBLIC DEFENDER AND
4 UNITED STATES ATTORNEY JOINTLY DISCUSSED, JOINTLY
5 PRESENTED A PLAN TO THE COURT, TO JUDGE BRITT TO WHOM ALL
6 OF THESE CASES WERE ASSIGNED AT THE TIME, AND IT'S MY --

7 **THE COURT:** NO, DIDN'T THE STANDING ORDER COME
8 OUT AFTER *COMSTOCK* AND AFTER JULY?

9 **MR. ACKER:** YES, YOUR HONOR.

10 **THE COURT:** JUDGE BRITT DIDN'T HAVE ALL OF THESE
11 CASES THEN, THEY WERE SCATTERED AMONG THE REST OF US.

12 **MR. ACKER:** I'D HAVE TO GO BACK AND LOOK, YOUR
13 HONOR, BUT I BELIEVE THAT WHEN WE FIRST STARTED TALKING TO
14 JUDGE BRITT ABOUT THESE, I BELIEVE ALL THE CASES WERE
15 STILL ASSIGNED TO HIM.

16 **THE COURT:** YOU WEREN'T TALKING TO HIM ABOUT IT
17 UNTIL *COMSTOCK* GOT HANDED DOWN.

18 **MR. ACKER:** THE *COMSTOCK* ORDER FROM THE SUPREME
19 COURT, YOU ARE CORRECT, YOUR HONOR.

20 **THE COURT:** UNTIL THAT HAPPENED, YOU HAD NO
21 FORECAST THAT YOU WOULD BE HAVING DISCOVERY OR ANYTHING
22 ELSE.

23 **MR. ACKER:** THAT'S CORRECT, YOUR HONOR. SO IT'S
24 OUR CONTENTION THAT THE CIVIL RULES DO APPLY, THAT WE ARE
25 ENTITLED TO DISCOVERY UNDER THE CIVIL RULES TO THE FULL

1 EXTENT OF THE CIVIL RULES, AND CERTAINLY TO THE EXTENT
2 UNDER THE STANDING ORDER.

3 ONE OF THOSE THINGS, YOUR HONOR, THAT WILL COME UP IN
4 PARTICULAR WITH MR. EDWARDS IS, AND WITH ALL OF THESE, IS
5 WHETHER OR NOT WE ARE ENTITLED TO INTERVIEW AND DEPOSE THE
6 RESPONDENT. IT'S OUR CONTENTION --

7 **THE COURT:** THE RESPONDENT, MEANING THE
8 DETAINEE?

9 **MR. ACKER:** THE DETAINEE.

10 **THE COURT:** YOU DID THAT WHILE HE WAS IN THE
11 BOP.

12 **MR. ACKER:** NO, YOUR HONOR. MOST OF THESE
13 REFUSED TO BE INTERVIEWED BY OUR EXPERT. SO OUR EXPERT
14 REPORTS ARE BASED SOLELY ON DOCUMENTARY EVIDENCE AND OTHER
15 OBSERVATIONAL EVIDENCE BUT NOT FROM AN INTERVIEW OF HIM.
16 MOST OF THESE REFUSED TO BE INTERVIEWED.

17 **THE COURT:** OKAY.

18 **MR. ACKER:** IF THE RESPONDENT, THE DETAINEE,
19 CONTINUES TO MAINTAIN THAT HE REFUSES TO TALK --

20 **THE COURT:** FIFTH AMENDMENT PRIVILEGES.

21 **MR. ACKER:** YES. HE CERTAINLY CAN CLAIM IT.
22 NOW, WE WOULD CONTEND --

23 **THE COURT:** YOU ARE NOT GOING TO GIVE HIM
24 IMMUNITY, ARE YOU?

25 **MR. ACKER:** NO, YOUR HONOR. WE CERTAINLY

1 BELIEVE HE'S ENTITLED TO CONTINUE TO CLAIM THOSE FIFTH
2 AMENDMENT PRIVILEGES.

3 NOW, IN CIVIL CASES, THE FINDER OF FACT MAY DRAW
4 INFERENCES FROM THAT. SO THE COURT MAY OR MAY NOT DRAW
5 ANY INFERENCES FROM THE FACT THAT HE CLAIMED THE FIFTH
6 AMENDMENT. BUT HE'S ENTITLED TO THAT; WE DON'T DISPUTE
7 THAT AT ALL. HOWEVER, YOUR HONOR, IF HE CHOOSES TO TALK
8 TO THE EXPERT HIRED BY HIS ATTORNEYS, WE BELIEVE THAT IS
9 WAIVING HIS FIFTH AMENDMENT PRIVILEGES IF THAT EXPERT IS
10 GOING TO TESTIFY AT TRIAL. BECAUSE THEN EVIDENCE FROM HIS
11 OWN MOUTH IS GOING TO COME IN THROUGH HIS EXPERT.

12 IF HE CHOOSES TO DO THAT, WE BELIEVE THAT HE SHOULD
13 BE REQUIRED TO ALSO SUBMIT TO AN INTERVIEW FROM THE
14 GOVERNMENT'S EXPERTS AS WELL AS SUBMIT TO A DEPOSITION
15 UNDER THE CIVIL RULES. IT'S MY UNDERSTANDING, AND HIS
16 ATTORNEYS CAN CORRECT ME IF I'M WRONG, THAT MR. EDWARDS
17 HAS NOT YET SPOKEN TO THEIR EXPERT BUT INTENDS TO. WE
18 CONTEND THAT IF HE EITHER HAS OR IF HE DOES, THAT WE'RE
19 THEN ENTITLED TO HAVE OUR EXPERT INTERVIEW HIM AND TO
20 DEPOSE HIM.

21 IF HE CHOOSES TO REMAIN SILENT, THAT'S FINE, YOUR
22 HONOR, BUT I DON'T THINK HE SHOULD BE ALLOWED TO TESTIFY
23 AT TRIAL. HE'S GOT TO MAKE A DECISION ONE WAY OR THE
24 OTHER. WE DON'T CARE WHICH ONE HE MAKES, BUT IF HE
25 CHOOSES -- IF HE WANTS TO TESTIFY AT TRIAL, THAT'S ONE OF

1 THE THINGS THAT MAKES IT DIFFERENT IN A CRIMINAL CASE. IN
2 A CRIMINAL CASE, HE CAN WAIT UNTIL AFTER THE GOVERNMENT
3 PUTS ON ITS EVIDENCE, BUT IN A CIVIL MATTER IF HE REFUSES
4 TO SUBMIT TO DEPOSITION AND REFUSES TO SUBMIT TO AN
5 INTERVIEW BY OUR EXPERTS, THEN WE BELIEVE THAT BOTH HIS
6 TESTIMONY AND ANY TESTIMONY FROM ANYONE ELSE WHO HAS
7 SPOKEN TO HIM, INCLUDING HIS EXPERT, SHOULD BE EXCLUDED
8 FOR FAILURE TO COOPERATE WITH DISCOVERY.

9 **THE COURT:** AS AN ASIDE, IN *COMSTOCK 2* IN THE
10 4TH CIRCUIT, DID THEY DIRECTLY ADDRESS THE CRIMINAL VERSUS
11 CIVIL ISSUE OR DID THEY -- WAS THAT NOT CONSIDERED TO BE
12 EMBEDDED IN THE REMAND?

13 **MR. ACKER:** I WOULD HAVE TO GO BACK -- I DON'T
14 BELIEVE THAT THE 4TH CIRCUIT DIRECTLY ADDRESSED THAT.
15 THEY MAY HAVE ADDRESSED IT, IN ESSENCE, IN THEIR ANALYSIS
16 TALKING ABOUT IT AS A CIVIL MATTER. I'D HAVE TO GO BACK
17 AND REREAD THAT OPINION.

18 **THE COURT:** THE *TIMMS* OPINION SIDE-STEPPED THAT
19 COMPLETELY. *TIMMS* WAS REMANDED WITHOUT EVER DEALING WITH
20 THE ISSUE OF WHETHER OR NOT IT WAS A CRIMINAL CASE.

21 **MR. ACKER:** THAT IS CORRECT, YOUR HONOR.

22 **THE COURT:** I MEAN, I'M JUST ASKING THIS TO SEE
23 IF I'M BARRED FROM TREATING IT LIKE A CRIMINAL CASE AND
24 SAYING THAT HE DOESN'T HAVE AN OBLIGATION TO TESTIFY, YOU
25 CAN'T COMPEL HIS TESTIMONY, AND YOU DON'T GET DISCOVERY.

1 **MR. ACKER:** WELL, YOUR HONOR, IF I RECALL IN
2 COMSTOCK 2, THEY ADDRESSED THE ISSUE OF BURDEN OF PROOF
3 AND SPECIFICALLY FOUND THE BURDEN OF PROOF WAS A
4 PREPONDERANCE OF THE EVIDENCE. I BELIEVE, WHETHER THEY
5 DIRECTLY ADDRESSED THAT ISSUE OR NOT, YOUR HONOR, IF THIS
6 WAS CRIMINAL THEN WE BELIEVE THAT IT WOULD HAVE HAD TO
7 HAVE BEEN BEYOND A REASONABLE DOUBT. BUT THEY FOUND --
8 NOT PREPONDERANCE, CLEAR AND CONVINCING. WE ONLY HAVE TO
9 PROVE BY CLEAR AND CONVINCING AND NOT BEYOND A REASONABLE
10 DOUBT.

11 SO I'D HAVE TO GO BACK TO THE LANGUAGE OF THE
12 OPINION, YOUR HONOR, TO MAKE ABSOLUTELY CERTAIN WHETHER
13 THEY ADDRESSED IT DIRECTLY, THE CIVIL VERSUS CRIMINAL
14 NATURE, OR ONLY INDIRECTLY.

15 **THE COURT:** WELL, I THINK IN COMSTOCK 1 THERE
16 WAS NO VETTING OR DEVELOPING OF THE ISSUE OF WHETHER IT
17 WAS A CRIMINAL PROCEEDING RATHER THAN A CIVIL PROCEEDING.
18 IN *TIMMS*, THE ARGUMENT WAS THAT IRRESPECTIVE OF WHAT THE
19 STATUTE SAYS AND PUTTING ASIDE WHAT CONGRESS MAY HAVE
20 LEGISLATED AS APPLIED, IT WAS CRIMINAL.

21 **MR. ACKER:** YOU STATE THAT CORRECTLY, YOUR
22 HONOR.

23 **THE COURT:** AND I DON'T KNOW THAT COMSTOCK 2
24 EVER OPENED THAT UP AND DEALT WITH THE "AS APPLIED" ASPECT
25 OF IT WHERE THE CERTIFICATION AND THE PUNISHMENT THAT

1 RESULTED FROM IT WAS CRIMINAL.

2 **MR. ACKER:** I'D HAVE TO GO BACK TO THE LANGUAGE
3 OF THE OPINION, BUT MY RECOLLECTION IS THAT THEY DEALT
4 WITH IT ONLY INDIRECTLY.

5 **THE COURT:** WELL, IT CAN'T BE BOTH, IT CAN'T BE
6 LIKE CRIMINAL BUT NOT REALLY CRIMINAL. IT HAS TO BE ONE
7 OR THE OTHER BECAUSE IF IT'S CRIMINAL THEN IT IMPLODES
8 WITH ALL SORTS OF CIVIL LIBERTIES, LIKE INDICTMENT AND EX
9 POST FACTO, AND DOUBLE JEOPARDY. THERE'S A LIMITLESS
10 NUMBER OF BARRIERS THAT RISE UP IF IT'S CRIMINAL, EITHER
11 AS APPLIED OR IN ANY WAY.

12 **MR. ACKER:** WELL, THAT'S WHY I BELIEVE, YOUR
13 HONOR, FOR PRECISELY THAT REASON I THINK *COMSTOCK 2* DID --

14 **THE COURT:** THEY DIDN'T SAY IT.

15 **MR. ACKER:** THEY MAY NOT HAVE SAID IT.

16 **THE COURT:** BOLD PRINT. THIS IS A CIVIL CASE,
17 NOT A CRIMINAL CASE, PERIOD, WE MAKE THAT RULING.

18 **MR. ACKER:** I DON'T BELIEVE THEY SAID THAT.
19 HOWEVER, THEY DID FIND THAT THE GOVERNMENT'S BURDEN IS
20 ONLY CLEAR AND CONVINCING AND NOT BEYOND A REASONABLE
21 DOUBT. IF YOUR HONOR IS CORRECT THAT IT'S ONE OR THE
22 OTHER, THEN THAT FINDING SAYS IT'S CIVIL.

23 **THE COURT:** YEAH, BUT THAT MAY BE -- I DON'T
24 KNOW WHAT IT IS, BUT IT MAY BE AN OUTGROWTH OF THE FACT
25 THAT THE TRIAL COURT, AT THE INITIAL *COMSTOCK* LEVEL, FOUND

1 THAT IT SHOULD BE PROOF BEYOND A REASONABLE DOUBT, NOT
2 CLEAR AND CONVINCING PROOF, AND THEY MAY HAVE BEEN LOCKED
3 INTO TALKING ABOUT THAT. THE TRIAL COURT, IF I'M CORRECT,
4 IN *COMSTOCK* 1 BACK IN 2007-ISH, WHENEVER IT WAS, RULED
5 THAT IT WAS CIVIL AND THAT THE BURDEN OF PROOF WAS BEYOND
6 A REASONABLE DOUBT, WHICH IS A LITTLE BIT OF AN ANOMALY;
7 IS THAT NOT CORRECT?

8 **MR. ACKER:** YOU ARE CORRECT, YOUR HONOR. I
9 BELIEVE THAT IS CORRECT. HOWEVER, THE 4TH CIRCUIT HAS THE
10 AUTHORITY TO UPHOLD A CONCLUSION OF THE DISTRICT COURT
11 EVEN FOR A DIFFERENT REASON. SO IF THE 4TH CIRCUIT HAD
12 BELIEVED THAT THIS WAS A CRIMINAL MATTER, THEN THE 4TH
13 CIRCUIT, I BELIEVE, WOULD HAVE RULED THAT THE PROOF SHOULD
14 BE BEYOND A REASONABLE DOUBT.

15 **THE COURT:** YEAH, AND IN *COMSTOCK* 2 THEY SAID IT
16 WAS BY CLEAR AND CONVINCING EVIDENCE.

17 **MR. ACKER:** THAT'S CORRECT. SO ACCORDING TO
18 YOUR HONOR'S ANALYSIS THAT IT HAS TO BE ONE OR THE OTHER,
19 I THINK THE 4TH CIRCUIT HAS RULED IT'S CIVIL.

20 **THE COURT:** BY IMPLICATION.

21 **MR. ACKER:** BY IMPLICATION.

22 **THE COURT:** ALL RIGHT. I MAY COME BACK. I
23 THANK YOU FOR YOUR WORK.

24 **MR. ACKER:** OKAY.

25 **THE COURT:** WHO'S GOING TO SPEAK TO THE EDWARDS

1 CASE? MR. ROSS.

2 MR. ROSS: YES, YOUR HONOR.

3 THE COURT: WHY IN THE WORLD DO YOU WANT TO
4 DELAY GETTING TO TRIAL IN THIS? WHY WOULD YOU BE ASKING
5 FOR AN EXTENSION? THIS DISCOVERY MATTER JUST BAFFLES ME.

6 MR. ROSS: I UNDERSTAND THAT, YOUR HONOR. I
7 THINK WE WANT THE COURT -- WE WANT THE COURT'S EXAMINER TO
8 SEE OUR CLIENT. WE DON'T KNOW WHETHER HE WILL SPEAK TO
9 HIM, BUT ONCE WE HAVE THAT WE WILL BE ABLE TO TURN OVER
10 DISCOVERY TO THE GOVERNMENT, WE'RE HOPING BY THE 15TH OF
11 THIS MONTH -- OF MARCH, EXCUSE ME.

12 THE COURT: BUT I WAS GOING TO TRY A CASE OR
13 CASES ON THE 21ST. I MEAN, I'M TRYING TO GET THESE TO
14 TRIAL AND EVERY TIME I DO, SOMEBODY COMES UP WITH A REASON
15 WHY THEY CAN'T EVER BE TRIED. I DON'T UNDERSTAND THAT.

16 MR. EDWARDS IS THE GENTLEMAN FROM NEW MEXICO OR
17 ARIZONA? HE'S FROM ARIZONA WHO HAD THE INTERPRETER, BUT
18 YOU AGREE HE DOESN'T NEED AN INTERPRETER?

19 MR. ROSS: THAT'S CORRECT.

20 THE COURT: WHY DON'T YOU -- I MEAN, WHAT ARE
21 YOUR PLANS FOR THE HEARING? DO YOU WANT HIM TO HAVE A
22 HEARING OR NOT?

23 MR. ROSS: YES. WE'LL BE READY IN EARLY APRIL.

24 THE COURT: DO YOU WANT TO CONFESS JUDGMENT AND
25 JUST ADMIT THAT HE'S DETAINABLE AND GO ON FROM THERE?

1 **MR. ROSS:** NO, YOUR HONOR. WE WILL BE READY FOR
2 THIS HEARING FOR THIS TRIAL IN EARLY APRIL.

3 **THE COURT:** SO THEY GAVE YOU THE DISCOVERY YOU
4 WERE ENTITLED TO BY DECEMBER 6, IS THAT WHAT THEY SAID?

5 **MR. ACKER:** OCTOBER 4, YOUR HONOR.

6 **THE COURT:** OCTOBER 4. AND DECEMBER 6 IS WHEN
7 YOU ASKED FOR AN EXTENSION?

8 **MR. ROSS:** YES, EARLY DECEMBER.

9 **THE COURT:** WHY DO YOU WANT AN EXTENSION? I
10 DON'T UNDERSTAND.

11 **MR. ROSS:** WELL, BASICALLY TO GET A COURT
12 EVALUATOR, IT TOOK SOME TIME BUT THESE EVALUATORS ARE ALL
13 OVER THE COUNTRY.

14 **THE COURT:** BUT THE TRIAL JUDGE IS GOING TO BE
15 THE EVALUATOR. WHY DON'T YOU WANT TO GET IN FRONT OF THE
16 JUDGE? SEEMS TO ME THAT THAT'S THE WAY TO GO.

17 **MR. ROSS:** YES, SIR. WELL, WE'RE HOPING TO GET
18 IN FRONT OF THE EVALUATOR, WHICH IS YOU, IN EARLY APRIL.

19 **THE COURT:** WAS IT JANUARY 28 WHEN WE WERE HERE
20 AND I MADE THESE DATES?

21 **MR. ACKER:** I DON'T REMEMBER THE EXACT DATE.

22 **THE COURT:** YOU WEREN'T HERE BUT MR. RENFER WAS
23 HERE.

24 **MR. ACKER:** I BELIEVE IT WAS ABOUT THAT TIME.

25 **THE COURT:** WAS IT FRIDAY THE 21ST OR 28TH?

1 **MR. ACKER:** IT WAS JANUARY 20TH.

2 **THE COURT:** OKAY. THURSDAY, THE 20TH. OKAY.
3 SO THAT'S THREE WEEKS AGO. I JUST KNEW THEN THAT THE
4 LAWYERS IN THIS CASE WERE GOING TO COME BACK AND SAY, WE
5 DIDN'T DO IT AND WE CAN'T DO IT, RATHER THAN WE HAVE DONE
6 IT. I JUST KNEW THAT AND I SAY THAT BECAUSE I HAVE THE
7 SAME LACK OF CONFIDENCE ABOUT THE 21ST AND SOME DATE IN
8 APRIL AND SOME DATE IN MAY AND SOME DATE IN JUNE. I HAVE
9 THE FEELING THAT ONLY THE COURT CARES; THAT THE LAWYERS
10 INVOLVED COULD CARE LESS, THAT THEY'VE COMMITTED
11 THEMSELVES TO SOME KAFKAESQUE, BYZANTINE APPROACH TO THIS
12 WHERE IT WOULD JUST CARRY ITS OWN WEIGHT INDEFINITELY AND
13 COME UP WITH A NEW RULE OF PROCEDURE OR NEW TWIST TO A
14 DEFENSE.

15 I MEAN, YEARS OF PLANNING, NOT A MOMENT OF EXECUTION.
16 THAT'S THE THEME OF THIS. I SAY THAT WITH CONFIDENCE
17 BECAUSE THAT'S WHAT'S BEEN GOING ON SINCE 2006. NOW WE'RE
18 IN 2011, WE'RE APPROACHING THE FIVE YEAR MARK OF THE FIRST
19 CASES.

20 COULD YOU IMAGINE WHAT WOULD HAPPEN IF THESE WERE
21 INDICTED CRIMES? THEY'RE INCARCERATED IN THE BOP. IF
22 THERE'S ONLY ONE PERSON WHO DOESN'T GET DETAINED AFTER
23 THEIR HEARING, HOW DO YOU GIVE THEM BACK THE TIME? SAY
24 WHOOPS, WE SHOULD HAVE TAKEN A LOOK AT THIS ONE, TWO,
25 THREE, FOUR YEARS AGO?

1 ARE YOU AFRAID YOU ARE GOING TO GET SUED FOR
2 MALPRACTICE OR SOMETHING LIKE THAT? WHY WOULDN'T YOU WANT
3 A HEARING THIS AFTERNOON OR MONDAY AND IF YOU LOSE, SIX
4 MONTHS LATER YOU GET TO DO IT AGAIN?

5 **MR. ROSS:** TO BE HONEST WITH YOU, YOUR HONOR,
6 THIS IS NEW TO ALL OF US.

7 **THE COURT:** WELL, IT'S NEW TO ME BUT I HAVE MORE
8 WILLINGNESS TO DO IT THAN ANYBODY ELSE DOES. IT WILL ONLY
9 BECOME OLD IF WE DO IT. HAVE YOU LOST ANYMORE CLIENTS
10 SINCE THE LAST HEARING?

11 **MR. ROSS:** NOT THAT I'M AWARE OF.

12 **THE COURT:** OKAY.

13 **MR. ACKER:** YOUR HONOR, OUR ONLY REQUEST IS THAT
14 WE BE GIVEN A REASONABLE PERIOD OF TIME AFTER WE GET THE
15 EXPERT REPORT AND THE DISCLOSURES FROM THEM, TO TAKE HIS
16 DEPOSITION AND THEN WE'LL BE READY FOR TRIAL.

17 **THE COURT:** OKAY. YOU GAVE THEM YOUR DISCOVERY
18 OCTOBER 4. SO NOVEMBER, DECEMBER, JANUARY, FEBRUARY,
19 THAT'S MORE THAN 120 DAYS AGO.

20 **MR. ACKER:** YES, YOUR HONOR.

21 **THE COURT:** TODAY IS THE 11TH. SO IT'S 125 DAYS
22 AGO, SOMETHING LIKE THAT. HOW CAN YOU NOT HAVE DONE
23 WHATEVER YOU NEEDED TO DO IN 125 DAYS?

24 **MR. ROSS:** THE FIRST TIME WE HAVE BEEN ABLE TO
25 SCHEDULE THE EVALUATOR IS FOR THE 28TH BECAUSE OF HIS

1 SCHEDULE, AND THAT IS --

2 **THE COURT:** GET ANOTHER EVALUATOR. IN OCTOBER
3 YOU SHOULD HAVE GOTTEN ANOTHER ONE. THIS IS THE ONLY ONE
4 IN THE WORLD? I DOUBT THAT. GET SOMEONE WHO'S AN
5 APPRENTICE, GET SOMEONE WHO'S LEARNING, GET SOMEONE WHO
6 DIDN'T WIN THE NOBEL PRIZE. SEEMS TO ME THAT TIME IS OF
7 THE ESSENCE.

8 SO WHAT IS IT YOU WANT? DIDN'T I SET THE CASE FOR
9 TRIAL ON MARCH 21?

10 **MR. ROSS:** NO. I BELIEVE MR. CRAVEN WAS SET FOR
11 MARCH.

12 **MR. CRAVEN:** I THINK THAT DATE WAS WITH RESPECT
13 TO THE CASE OF ANTON JOHNSON. I'M PREPARED TO SPEAK.

14 **THE COURT:** WE'LL GET TO THAT.

15 **MR. CRAVEN:** I'M PREPARED TO SPEAK TO THAT
16 SITUATION.

17 **THE COURT:** OKAY, WE'LL GET TO THAT.

18 **MR. ROSS:** IF THE COURT ALLOWS, WE WILL BE READY
19 ON MARCH 28.

20 **THE COURT:** MARCH 28?

21 **MR. ROSS:** YES.

22 **THE COURT:** ALL RIGHT. WHAT DO YOU MEAN, BE
23 READY? DOES THAT MEAN THAT YOU WILL GIVE THEM YOUR
24 DISCOVERY ON MARCH 28?

25 **MR. ROSS:** WE WILL GIVE THEM OUR DISCOVERY BY

1 MARCH 15.

2 **THE COURT:** OKAY.

3 **MR. ACKER:** YOUR HONOR, WE HAD NOT OPPOSED THEIR
4 EXTENSION OF TIME THROUGH MARCH 7, AND WE STILL DO NOT
5 OPPOSE THAT. IF THEY'RE NOT GOING TO PRODUCE THEIR REPORT
6 TO US UNTIL MARCH 15, THEN WE DON'T BELIEVE MARCH 28 IS A
7 SUFFICIENT TIME FOR US TO TAKE HIS DEPOSITION AND GET IT
8 TRANSCRIBED AND BE READY. SO WE DON'T OBJECT TO
9 MARCH 28TH AS THE TRIAL DATE AS LONG AS THEY PRODUCE THEIR
10 REPORT TO US ON MARCH 7.

11 **THE COURT:** WHY DON'T YOU TAKE HIS DEPOSITION
12 NOW?

13 **MR. ACKER:** WE CERTAINLY CAN, YOUR HONOR, BUT IT
14 SOUNDS LIKE HE'S NOT EVEN GOING TO MAKE A DECISION UNTIL
15 FEBRUARY 28 AS TO WHETHER OR NOT TO SPEAK TO HIM TO WAIVE
16 HIS FIFTH AMENDMENT RIGHTS, IS MY UNDERSTANDING.

17 **MR. ROSS:** YOUR HONOR, WE CAN GIVE IT TO THEM BY
18 THE 7TH.

19 **MR. ACKER:** THAT WILL BE FINE, YOUR HONOR. THEN
20 WE WILL BE PREPARED TO PROCEED ON MARCH 28.

21 **THE COURT:** ALL RIGHT. IF YOU WILL GIVE ME A
22 SCHEDULE, I'LL APPROVE IT. THANK YOU.

23
24 END OF TRANSCRIPT
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1 CERTIFICATE

2 THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF
3 PROCEEDINGS TAKEN AT THE CIVIL SESSION OF UNITED STATES
4 DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF THE
5 PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND
6 TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

7 THIS THE 26TH DAY OF AUGUST, 2011.

8
9 /S/ DONNA J. TOMAWSKI

10 DONNA J. TOMAWSKI
11 OFFICIAL COURT REPORTER
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